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The Technique of Licensing at European Union Level - Used as a Means of Environmental Protection

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Abstract: Licensing represents one of the modern techniques most often used as an environmental protection means. In concrete, this technique is envisaged in the obligation of obtaining an authorization (lato sensu) in order to develop a certain activity or to use a product or service that is considered to attain an ecological risk, respectively the granting of permits, licences, authorisations or certifications. Authorisation (licensing) is based on the Environmental Impact Assessment, which is a constitutive part of the authorization process, as the conclusions of the environmental impact assessment study are conditioning the result of the authorization process. In order to attain a panoramic and complete reflection of the authorization as an environmental protection legal instrument, we consider to be highly useful the presentation of two transversal instruments, characterised of proactive operativity, a high degree of participation on the part of the involved subjects and a high level of environmental protection that they tend to attain. Basically, these two instruments are Environmental Impact Assessment and Strategic Environmental Assessment.

Keywords: legal instruments; pollution; European Union

1 Introduction

Licensing represents one of the modern techniques most often used as an environmental protection means. In concrete, this technique is envisaged in the obligation of obtaining an authorization (lato sensu) in order to develop a certain activity or to use a product or service that is considered to attain an ecological risk, respectively the granting of permits, licences, authorisations or certifications. The formal proceedings of licensing are imposed to all of the products or services that are considered to be dangerous for the environment and are listed consequently. All the member states derive their licensing systems from one or more legal instruments (Kiss, Shelton, 1993, p.54) Through the licensing, the public authorities, as bearers of the general interest of protecting the environment, verify the preliminary fulfillment of certain location conditions, establish a series of technical and technological parameters for working, implement a control on the activity and fulfillment of the norms that aim at the environmental protection (Duțu M., 2007, p.55). In addition to laws containing general licensing measures, it is common to find norms that regulate directly or indirectly only specific aspects of environmental protection, such as pollution (Kiss, Shelton, 1993, p.55).

2 Paper Preparation

The licensing system at member-states of the European Union level consists of numerous different regulations, while the common regulation is limited to the obligation that certain activities should be subject to environmental licensing, meaning that all the conditions provided have to be fulfilled. Most of the licensing systems are not designed to eliminate all pollution or risk, which would be impossible anyway, but rather to control serious pollution, and to reduce its levels as much as possible. Considering this aspect, the licensing systems are considered to be an intermediary technique between the non-regulated practices and the absolute prohibitions (Duțu, M, 2007, p. 403). The licensing represents a typical manifestation of the administrative intervention activity that reflects the principle of the preventive action. Its essence consists of the fact that it does not exhaust its effects in the moment when the licensing is granted, but it may also vary[1]. The European law, recognizing the advantages of this instrument, utilizes it in a large variety of situations, and therefore numerous European regulations from the environmental field [2] impose that certain activities or projects shall be subject to licensing prior to their beginning (Moreno Molina, 2006, p. 126). Generally, subject to licensing are those activities that have a great potential of risk to the environment, irrespective of the fact that their holder is a legal or natural entity and that it has a lucrative purpose or not. As a general rule, the projects of the public organs, especially the military ones, are exempted from the obligation of licensing.

In some cases, the European authorization legislation do not provide which are the consequences of performing an activity which is subject to a licensing without having the necessary licensing, while in other cases[3] it is clearly provided that the lack of the necessary licensing leads to the interdiction, cease or cancellation of the activity. The licensing is based on the prior assessment of the ecological impact, which is an important part of the licensing process, the result of the licensing process depending on the conclusions of the impact assessment (a study presented in a report). We must draw attention over the fact that the terminology used in the European environmental law is a varied one and sometimes even confusing, reason why we decided to use the term of licensing, that we appreciate to be the most used, given that from the juridical point of view, between the different terms we met that depict this notion, there are no differences that would impose the consideration. We also remind among the different used terms in order to designate this notion, the most used are: authorisation, authorizing, licensing, license, permit, etc.

The given definitions do not have a dogmatically strictness, even the IPPC Directive[4] offers a confuse definition of the „permit", showing that 'permit` shall mean that part or the whole of a written decision (or several such decisions) granting authorization to operate all or part of an installation, subject to certain conditions which guarantee that the installation complies with the requirements of this Directive. Therefore it results that the *permit* is a *decision* through which an authorization is granted. Sometimes, the European regulations [5] do not offer a definition for the licensing although it represents the central object of the norm, which offers an exhaustive regulation of its content and effect. We therefore appreciate that the terms are perfectly inter-changeable, as they are not legally different, the

[1] It can be subject to the control and periodical evaluation, it may assimilate new conditions or criteria when the public interest imposes it.

[2] Among which we remind the Council Directive 76/464/EEC of 4 of May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community and the Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants.

[3] This is the case of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, which imposes to the states by art 4.5 the obligation to take the necessary measures in order to stop the unauthorized commercialization.

[4] Council Directive 96/61/EC of 24 September 1996, concerning integrated pollution prevention and control (IPPC).

[5] Such is the case of the Council Directive 1999/31/EC of 26 April 1999 concerning waste disposal.

authorisation referred to by the European environmental directives being an administrative decision given by the competent public authorities, that certifies the respect of the pertinent European standards imposed and whose grant is required in order to legally perform a certain activity. The absence of the necessary licensing for the performance of an activity enhances the enforcement of the sanctioning power of the national public administrative authorities, the Union not having the direct administrative powers to enforce its own environmental law (Moreno, 2006, p. 127).

As an example, the European law provides the obligation to own a license for a series of industrial installations, for the artificial „enrichment" of the subterranean water, namely for over-flows, as well as for the production and merchandising of certain products as pesticides, biocides, as well as the import or export of the substances that affect the ozone layer or the exploitation of the endangered species of plants or animals. Regarding the conditions referring to the authorization, a general rule cannon be provided. It can only be shown that the first directives referring to authorization used the technique of establishing detailed conditions, which were never truly controlled. Many times, the conditions are vaguely provided, leaving a large freedom of interpreting to the member states (Duțu, 2005, p. 202).

The same is the situation of the requirements regarding the licensing procedure, these being even more rarely met[1].

In order to get a panoramic and complete view on the licensing as a legal instrument of environmental protection, we appreciate that it is relevant to present two related instruments which are characterized by an operative pro-activeness, with a high degree of participation of the interested subjects and a high degree of environmental protection. More precisely, these instruments are *EIA- Environmental Impact Assessment and SEA- Strategic Environmental Assessment.*

EIA - Environmental Impact Assessment

Regarding the issue of the licensing, one of its main conditions is the general obligation of performing the prior *Environmental Impact Assessment*. The environmental impact assessment is a complex administrative procedure, completed through a forecast, assessment and prevention of the effects that a certain project – either public or private - may have, project that has a certain relevance on a series of elements of the environment[2]. This instrument was introduced at the European Union level by the Directive 85/337/EEC[3] and was created as a consequence of the implementation of the preventive action principle within the procedures of licensing in the environmental field (Bellomo, 2008, p. 150).

The assessment of the impact on the environment, known as EIA (Environmental Impact Assessment) is a procedure to ensure that adequate and early information is obtained on likely environmental consequences of development projects and on possible alternatives and measures to mitigate harm (Kiss, Shelton, 1993, p. 58). The EIA Directive is one of the first and most significant examples of horizontal norms with procedural character, this being adopted within the Third Action Programme in the Environmental Field. The instrument introduced the environmental coordinate in the procedures regarding the licensing, addressed to the national authorities, for certain projects capable to produce a significant impact on the environment (Plaza, 2005, p. 554).

[1] We remind a series of requirements regarding the procedure within the Directive 96/61/CE IPPC, which imposes a written demand with a number of minimum indications and a summary of the documentation, which must be left at the disposal of the public for a sufficient period of time, the public having to be given the opportunity to state their opinion on the project.
[2] Concrete examples of such projects may be a highway, a port, a tunnel.
[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

There can be different types of environmental impact assessment, depending on the importance of the project – European, internal (state level) and regional. Obviously, not all the projects must be evaluated, only the most relevant, which have a significant impact on the environment and therefore are mentioned in the corresponding regulations. For other cases provided by the law there are specific procedures – screening procedures – that assess periodically, based on the quantitative or other type parameters, if it is necessary to activate this procedure (Bellomo, 2008, p. 151).

The EIA Directive was modified in 1997, through Directive 97/11/EC[1], which aimed at registering the procedure in the frame defined by the Convention from Espoo[2], regarding the environmental impact assessment in a trans-border context, the avoidance of the divergences of interpretation of the member states and an early assessment of the ecological impact (Duțu, 2007, p. 207).

At present, the executive of the EU proposes a new review of the EIA Directive dated 1985; it could be replaced by a regulation or incorporated within a unique regulation that could cover all the regulations regarding the environmental assessments, these being the options expressed by the Commission as the object of its analysis.[3]. According to the dispositions of the directive, the competence to establish the necessary conditions for the assessment of the notable impacts of a project, before the licensing, comes to the member states.

Article 2.1 of the directive represents one of its major dispositions. According to it, before the license is granted, the projects which by their nature, dimension of location have a potential to affect the environment must be subject to an assessment of their effects. The applicability of these dispositions, which seems to be extremely permissive, is provided, showing that this addresses to the public and private projects that may have a significant impact on the environment.

The EIA Directive states that any project mentioned in Annex I or II is to be subject to an assessment regarding the effects that it may produce on the environment. „Project" in the meaning of the Directive signifies any activity or human action that determines significant changes in the environment. In order to clarify and give more legal certitude to the concept of project, the directive includes a general definition in art. 1.2 and establishes two categories of projects that must be subject to the assessment, exposed in annex I and II (Moreno, 2006, p. 44, 49). The meaning of "project" includes the execution of certain constructions, installations, works or other interventions on the environment, including the ones that involve the extraction of mineral resources. According to the provisions of the directive, the national defence projects are not subject to such assessment. The directive does also not apply to projects whose details are adopted through specific acts of internal legislation.

The projects to which the directive may be applied are divided in two different categories, each of them being listed in a specially designed annex. Annex I includes the categories of projects that are object to impact assessment, while Annex II includes the projects regarding which the member states must decide according to the internal legislation criteria if they must or do not have to be subject to the environmental impact assessment. In this case, the member states have the obligation to abide by the requirements exposed in Annex III when establishing the applicable criteria, which refer to characteristics of the projects, location, possible impact (Jans & Vedder, 2000, p. 314).

[1] Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.
[2] Signed at 25th February 1991 and enforced at 10th September 1997.
[3] According to the European Commission, quoted at 6th of July 2008, by ENDS Europe, http://www.endseurope.com/24286?DCMP=EMC-EE-12-07-2010

Regarding the procedural aspects, the EIA Directive leaves the member states a considerable freedom regarding the manners of performing the analysis. Art. 5 and Annex III provide that the minimum information that must be provided by the holder of the project is related to:

- the description of the project, including information regarding the location, dimensions;
- the description of the measures provided to avoid, reduce and remedy if possible the significant side effects;
- the necessary data for the identification and assessment of the main effects of the project on the environment;
- a list of the main alternatives studied by the developer and the main reasons of his choice, by taking into account the effects on the environment;
- a non-technical summary of the information provided.

Annex IV of the directive contains details regarding the information that must be provided.

Besides these, there are some rules that must be obeyed in order for the project to be authorised. The consultation of the public is an important element and an instrument of EIA, its role being also highlighted by the amendments brought to the directive EIA by the Directive 2003/35 regarding the public participation[1], the public being allowed to express their opinion before the beginning of the project. Also, the authorities that may be interested by the respective project must have the possibility to express their opinion and give advice regarding the information provided by the developer, according to art. 6 of the Directive (Duțu, 2007, p. 408). Moreover, although the Directive does not mention this aspect, the Court established through its jurisprudence[2] that the member states have the right to ask for a reasonable quantity of information. The final result of the environmental impact assessment is a statement of impact of the project on the environmental parameters taken into account, which does not mean that if the result is negative, the project cannot be completed, but rather that the effects of the assessment on the main procedure will be determined by the law (Bellomo, 2008, p. 152).

The logical consequence of these dispositions, indicated also in art. 8 of the Directive is that in the procedure of analysis of the request and the decision making, the results of the consultation and the information provided must be taken into account in the development of the licensing procedure (Jans, Vedder, 2000, p. 319). In cases where a project is susceptible to have notable consequences on the environment of another member state or when a member state that may be affected considerably asks for this, the home state of the project has the obligation, according to art 6 and 7 of the Directive EIA, to give the other state all the information possessed. This information is the basis for any consultation within the bilateral relationships between the two states (Duțu, 2007, p. 409).

Generally, on the basis of expert and public opinions, if it is determined that the activity or project would cause serious and irreparable damage to the quality of the environment, the agency is directed to refuse authorization or approval. If the project or activity can be modified to eliminate or compensate for the negative effects, it may be approved subject to such modification or control (Kiss, Shelton, 1993, p. 60).

When the decision to grant the licensing or not was taken, according to art. 9 of the EIA Directive, the competent authority must inform the public and make available information regarding:

- the content of the decision and all the conditions involved;

[1] Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[2] Case C-216/05 *Commission vs Ireland* [2006] ECR I-10787.

- the main reasons and aspects taken into account when taking the decision, subsequent to the analysis of the opinions and concerns of the public, as well as information regarding the process of public attendance in taking the decision;
- the description of the main measures aimed to avoiding, reducing and eliminate as much as possible the negative effects of the project.

The directive allows to the member states to give, in exceptional cases, the exemption of certain projects from the environmental impact assessment although they are listed in the categories of projects provided in the annexes I or II of the Directive. This is the case of the projects regarding the national defence, those approved by a legislative act or those exempted by the government under certain circumstances. The system has its flaws, because it allows to the member states to shirk from the compliance of the European law in a very simple way. In such cases, the state has only the obligation to communicate its decision to the Commission, which does not have the possibility to reject the proposal and prevent the grant of the exempt. Still, a certain remedy was performed by the Court[1], which established that the exceptions must be strictly interpreted, giving certain landmarks in this sense (Moreno, 2006, p. 51).

The proliferation and magnitude of the EIA instrument – Environmental Impact Assessment – reflects its important contribution to the environmental protection. By the fact that it insists on investigating and communicating the environmental risks to the potential affected parties, the EIA ensures a high degree of a decision making based on appropriate information (Kiss, Shelton, 1993, p. 61).

At national level, in Romania, OUG 195/2005 (governmental urgent ordinance) defines in chapter I art.2, points 30 and 31 the environmental assessment and the environmental impact assessment, as art. 21 establishes the general frame of the environmental impact assessment. The EIA Directive is transposed in the Romanian legislation through HG 1213/06.09.2006 (governmental decision) regarding the set-up of the procedure of the environmental impact assessment for certain public and private projects and implemented through the following norms:

- OM 860/2002 (ministerial order) for the approval of the procedure of environmental impact assessment and the issue of the environmental agreement, modified by OM 210/2004 and OM 1037/2005;
- OM 863/2002 regarding the approval of the methodological guidelines applicable to the stages of the procedure;
- OM 864/2002 for the approval of the EIA procedure in a trans-border context and for the public attendance in taking the decision within the projects with a transboundary impact.

According to the national regulations of implementation of the directive, the EIA procedure is realised in the following stages:

- the stages that have as object the determination of the necessity to have a project assessed environmentally;
- the assessment of the environmental impact;
- the consultation of the public and public authorities with responsibilities in the domain of environmental protection;
- taking into account the report of the environmental impact assessment and the results of these consultations in the decisional process;
- making the decision of granting/rejection of the environmental permit;

[1] Case C-435/97 *World Wildlife Fund and others vs Autonome Provinz Bozen and others* [1999] ECR I-5613 and Case C-287/98 *Luxembourg vs Berthe Linster and others* [2000] ECR I – 6917.

- ensuring the information on the decision made.

The licensing is translated in the environmental agreement, defined as a technical-legal act by which the conditions of the project are established, from the point of view of environmental impact.

The environmental agreement is issued by the authorities of environmental protection and gives the applicant of the project the right to develop the project from the point of view of the environmental impact. In order to obtain the environmental agreement, the public or private projects that may have a significant impact on the environment because of their nature, dimension or localisation, are subject to the EIA procedure. The obligation to be granted an environmental agreement is mandatory for the public or private projects or for their modification or extension of current activities, including the decommissioning projects, which may have a significant impact on the environment[1].

The Strategic Environmental Assessment- SEA

The Strategic Environmental Assessment is an European environmental law instrument that aims at assessing the impact on the environment, not of the projects seen individually, but of the plans and programs within which projects are contained. Thus, this instrument is supposed to be even more effective and dynamic than EIA, with a view to discover the deep impacts of certain projects (Moreno 2006, p. 53). The SEA Directive – Strategic Environmental Assessment[2] does not substitute or overlap the EIA Directive, as it provides a procedure situated in a temporary plan that is prior to the environmental impact assessment. The philosophy expressed by this instrument is a double one: on one hand, this completes the impact statement, respectively the directive that provides it, and on the other hand, it realises a better transparency of the decisions that follow the strategic assessment (Duțu, M, 2007, p. 204). The strategic environmental assessment[3] takes place prior to the impact assessment and is completely different from this one mainly because it is an expression of the principle of precaution and not of the preventive action, giving an obvious character of operative discretion, compared to the environmental impact assessment. The strategic assessment is a process and not a procedure like in the case of the EIA, that aims at inserting in the plans and programs, not in the politics, of certain considerations regarding the environmental protection, trying to act prior to the decision of performing a work and not subsequent to making this decision by the developer, like the case of the environmental impact (Bellomo, 2008, p. 151). This technical- legal instrument is applicable for two categories of plans and programs, the fist one including the plans and programs which are compulsory subject to the strategic evaluation because they are always susceptible of having considerable effects on the environment, especially regarding the fields they aim at, and the second category is regarding the plans and programs that establish the framework of the decisions made subsequent to the licensing of the projects".

The main innovative element is the application domain of the instrument, considering that all the legal texts and administrative decisions are subject to the strategic environmental assessment[4].

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[1]*The EIA procedure for certain public and private projects, Ministry of the Environment and Forests, National Agency for the Environmental Protection, www.anpm.ro/.../EVALUAREA%20IMPACTULUI%20ASUPRA%20MEDIU.*

[2] Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[3] The strategic evaluation was born in 1981 in the US, resulting from Housing and Urban Development Department, being then introduced in Europe in 2001 by the Directive 2001/42/EC whose transposition in the member states legislation should have taken place until 21th of July 2004. In Italy, for example, the transposition was realized through the environmental code 152/06, even if there are still many issues regarding a complete implementation of the instrument.

The phases(stages) that compose the strategic assessment are: *the screening* or the definition of the investigational area necessary to the assessment; *the documentation of the state of the environment,* finding and choosing the knowledge base necessary for the assessment; *the definition of the possible significant impacts* on the environment, often expressed in „trend" or tendency terms rather that foreseen values; *information and consultation of the public;* the interaction with *the decisional process* based on the assessment; and finally *the monitoring of the effects* of the plan or program after the enforcement (Bellomo, 2008, p. 152).

Stating from this general presentation of the SEA Directive it can be easily observed that its operational and procedural structure is based on the EIA Directive EIA. Briefly, its key elements are the following:

- the preparation of a report regarding the environment, this environmental report (statement) represents the central axe of the SEA. The document will contain mandatorily the information demanded by art.5 and Annex I of the Directive SEA. It has to identify, describe and assess the significant effects of the plan or programme on the environment as well as the reasonable alternatives. The precise content of this document is individualized in Annex I of the directive, which indicates in article 13 that all the member states have to ensure that the report responds qualitatively to the prescriptions of the directive;
- the consultations are another key element of SEA, this must take place both between the involved authorities and between the competent authorities and the concerned public; the appropriate conditions must be ensured in order for them to be able to express their opinion. Same as in the case of the EIA Directive, when the plan or programme may have trans-border effects, all the possibly affected states must be consulted;
- the assessment of the results, according to art. 8 of the Directive SEA have to be performed by taking into account the environmental statement and the opinions expressed through consultations, but the results are not mandatory for the authority that has the competence to approve the plan or programme;
- the information regarding the decision made has to be made available to the public concerned, to the states potentially affected and to the other authorities consulted.

SEA represents a strategic instrument which facilitates the integration of the environment issues in the decision-making process, starting from the initial stage of issuing the programs and plans in order to attain a sustainable development. At internal level, the SEA Directive 2001/42/EC was transposed in the Romanian legislation by HG 1076/2004 (governmental decision) concerning the establishment of the procedure of performing the attainment of the environmental evaluation for plans and programmes[1], according to which the Strategic Environmental Assessment for plans and programmes has as its scope the identification and analyses of the effects of the plans or programmes on the environment during the conception of the plan or program and before its adoption.

Within the SEA procedure, as it is reflected in the national legal framework, the programme's project completion and the issuing of the environmental report are simultaneously realised within a special working group.

Not all the plans or programs are subject to SEA. The public authorities for environmental protection – after consulting other public authorities interested in the effects that the plan or program may have on the environment, decide if a plan or programme has to be subject to this procedure.

[1] Published in the Official Journal, part I, nr. 707 from 5 august 2004.

The work -group is composed of representatives of the holder, of the competent authorities for environmental protection and health, of other authorities interested in the effects of the implementation of the plan or programme, designated by the Ministry of the Environment subsequent to the screening stage of the project or plan, of one or more natural of juridical entities attested according to the legal provisions in force, as well as of experts that may be hired. The completion of the project of the plan or program, the establishing of the domain and the level of detail of the information that has to be included in the environmental report, as well as the analysis of the significant effects of the plan or program on the environment are realized within the work-group.

The strategic environmental assessment goes through the following stages, according to the internal regulations:

- issue of the environmental report;
- consulting the public and public authorities interested in the effects and the implementation of plans and programs;
- taking into account the environmental report and the results of these consultations in the decisional process;
- making available the information on the decision made.

The results of the environmental assessment are presented in the environmental report and the SEA is finalised by issuing the environmental approval by the competent authority for the environmental protection, based on the project of plan or programme and the environmental report[1].

3. Conclusions

Considering the facts and elements presented above, we conclude that the instrument of licensing is an effective technical-legal environmental protection means that largely contributes to attaining the goal of a high level of protection as well as to realize environmental democracy by public participation, and we appreciate that it has to be seriously applied by the public authorities involved in the procedure as well as to be extended to most of the projects, plans and programmes developed at internal level.

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